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PERFORMANCE FOOD GROUP, INC. and VISTAR TRANSPORTATION, LLC

and *Specially Appearing* Defendant ROMA FOOD ENTERPRISES, INC.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

JORGE PEREZ, on behalf of himself, all  
others similarly situated, and the general  
public,

Plaintiff,

vs.

PERFORMANCE FOOD GROUP, INC., a  
Colorado corporation; VISTAR  
TRANSPORTATION, LLC, a Delaware  
limited liability company; ROMA FOOD  
ENTERPRISES, INC., a California  
corporation; and DOES 1-50, inclusive,

Defendants.

CASE NO. 3:15-cv-02390-HSG

***SPECIALLY APPEARING DEFENDANT  
ROMA FOOD ENTERPRISES, INC.'S  
MOTION TO DISMISS PLAINTIFF'S  
SECOND AMENDED COMPLAINT  
PURSUANT TO FED. R. CIV. P. 4, 12(b)(4)  
AND/OR 12(b)(5) OR, ALTERNATIVELY,  
TO QUASH SERVICE OF SUMMONS:***

**(1) NOTICE OF MOTION**

**(2) MEMORANDUM OF POINTS AND  
AUTHORITIES**

***Filed Under Separate Covers:***

**(3) DECLARATION OF MICHELLE  
BENTON**

**(4) DECLARATION OF BRIAN HICKMAN**

**(5) DECLARATION OF MAGGIE KELLY**

**(6) [PROPOSED] ORDER**

**Date: December 22, 2016**

**Time: 2:00 p.m.**

**Crtrm.: 10 – 19<sup>th</sup> Floor**

**Judge: Hon. Havwood S. Gilliam, Jr.**

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**NOTICE OF MOTION**

**TO PLAINTIFF JORGE PEREZ AND HIS COUNSEL OF RECORD:**

**NOTICE IS HEREBY GIVEN** that, on December 22, 2016, at 2:00 p.m., in Courtroom 10 of the United States District Court, Northern District of California, located at 450 Golden Gate Avenue, 19th Floor, San Francisco, CA 94102, *Specially Appearing* Defendant Roma Food Enterprises, Inc. (“Defendant” or “RFE”), will and hereby does move the Court to dismiss Plaintiff’s Second Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(4) and/or 12(b)(5) or, alternatively, to quash service of summons, on the grounds permitted therein, as more fully argued below, in RFE’s further papers filed in support of this motion and at the hearing hereon.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff is a former employee of Defendant Performance Food Group, Inc. (“PFG”). His operative Second Amended Complaint (“SAC”) in this action purports to allege claims for various wage and hour violations against Defendants PFG and Vistar Transportation, LLC (“VT”), and now *Specially Appearing* Defendant Roma Food Enterprises, Inc. (“RFE”). However, Plaintiff has never been employed by RFE. In fact, RFE ceased to exist in February 2008, long before Plaintiff ever began working for PFG, when it was merged into Vistar Corporation.

As we discuss below, Plaintiff’s SAC should be dismissed as against RFE pursuant to Fed. R. Civ. P. 12(b)(4) for insufficient process because the summons Plaintiff purported to serve upon RFE is defective due to its failure to comply with Fed. R. Civ. P. 4’s requirements that it name the court and the parties, be directed to the defendant, be signed by the clerk and bear the seal of the court.

Additionally, and more significantly, dismissal is warranted pursuant to Fed. R. Civ. P. 12(b)(5) for insufficient service of process because the summons Plaintiff purported to serve upon RFE was instead served on PFG’s registered agent for service of process, which is neither affiliated with nor authorized to accept service on behalf of RFE, and Plaintiff has not otherwise effected service of the Summons upon RFE. Further, there is no reasonable prospect that Plaintiff will ever be able to effectively serve RFE given that RFE ceased to exist.

1 Therefore, as we discuss more fully below, the Court should grant this Motion and dismiss  
2 the SAC against RFE or, alternatively, quash service of the summons on RFE.

## 3 **II. STATEMENT OF FACTS**

### 4 **A. PROCEDURAL HISTORY**

5 On April 20, 2015, Plaintiff Jorge Perez (“Plaintiff”) filed a Complaint against Defendants  
6 PFG, VT and then-named Defendant Roma Gourmet Food Enterprises of California, Inc.  
7 (“RGFEC”) in the Superior Court of the State of California in and for the County of Alameda (the  
8 “State Court Action”). On May 18, 2015, Plaintiff filed an Amendment to the Complaint  
9 purporting to substitute DOE 1 with *Specially Appearing* Defendant RFE in the State Court  
10 Action. *See* Dkt. #1-7.

11 On May 29, 2016, Defendants PFG and VT removed the State Court Action to this Court.  
12 *See* Dkt. #1. Defendants RGFEC and RFE had not been served as of the date of removal because  
13 they were and are no longer in existence and, therefore, their citizenship was properly disregarded  
14 for purposes of removal.

15 On June 11, 2016, Plaintiff filed a First Amended Complaint (“FAC”) against PFG, VT  
16 and RFE [Dkt. #8].<sup>1</sup> Defendants VT and PFG filed a Motion to Dismiss and/or Strike Plaintiff’s  
17 FAC [Dkt. #16], which was partially granted by the Court on March 23, 2016 [Dkt. #28].  
18 Thereafter, Plaintiff filed the operative SAC against PFG, VT and RFE on April 13, 2016 [Dkt.  
19 #29].

20 On May 11, 2016, a process server hand delivered to PFG’s registered agent for service of  
21 process in Denver, Colorado, National Registered Agents, Inc. (“NRAI”), a copy of a Summons  
22 issued by the California Superior Court, County of Alameda (the “State Court Summons”), as well  
23 as copies of the Complaint, FAC and SAC in this action. *See* Declaration of Brian Hickman  
24 (“Hickman Decl.”), ¶ 4, Exh. A; Declaration of Maggie Kelly (“Kelly Decl.”), ¶ 2, Exh. A. The  
25 State Court Summons names “Performance Food Group, Inc.,” “Vistar Transportation, LLC” and  
26 “Roma Gourmet Food Enterprises of California, Inc.” as defendants. Hickman Decl., ¶ 4, Exh. A;

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27  
28 <sup>1</sup> The FAC removed RGFEC as a named defendant.

1 Kelly Decl., ¶ 4, Exh. A. RFE is not named as a defendant in the State Court Summons, and no  
2 summons issued by this Court was or ever has been delivered or served.

3 On May 18, 2016, Plaintiff filed a purported Affidavit of Service in this Court [Dkt. #37]  
4 bearing the signature of a process server with Front Range Legal Process Service, Inc. The  
5 Affidavit of Service purports to certify that, on May 10, 2016, the State Court Summons and  
6 copies of the Complaint, Amendment to Complaint, FAC and SAC were delivered to PFG's agent  
7 for service of process. More specifically, the Affidavit of Service states that the State Court  
8 Summons and copies of the Complaint, Amendment to Complaint, FAC and SAC were delivered  
9 to "Maggie Kelly as Prociess [sic] Specialist/Authorized for Roma Food Enterprises, Inc." at  
10 "Roma Food Enterprises, Inc. At Performance Food Group's Registered Agent NATIONAL  
11 REGISTERED AGENTS, INC., 1675 Broadway, Suite 1200, Denver, CO 80202."

12 On May 31, 2016, the parties stipulated to extend RFE's time to respond to the SAC by 21  
13 days [Dkt. #40]. The parties subsequently entered into a further stipulation to extend RFE's  
14 deadline to respond to Plaintiff's SAC or otherwise move to quash service of process and/or to  
15 dismiss for defective service to October 10, 2016, which was approved by the Court on June 22,  
16 2016 [Dkt. #42].

#### 17 **B. RFE'S CORPORATE HISTORY**

18 The corporate entity formerly known as "Roma Food Enterprises, Inc." no longer exists.  
19 Declaration of Michelle Benton ("Benton Decl.") at ¶ 2. It was acquired by Vistar Corporation on  
20 January 28, 2005 pursuant to a Stock Purchase Agreement and subsequently merged into Vistar  
21 Corporation on February 25, 2008. *Id.* On November 9, 2010, Vistar Corporation changed its  
22 name to Performance Food Group, Inc. *Id.* Thus, RFE has had no employees, officers, managing  
23 or general agents, or designated agents for service of process, and has had no ongoing business  
24 operations, for over six years now. *Id.* at ¶ 3.

#### 25 **C. PLAINTIFF'S EMPLOYMENT**

26 Plaintiff Jorge Perez was employed by PFG in City of Industry, California, from May 29,  
27 2013 until June 11, 2014. *Id.* at ¶ 4. Plaintiff has never been employed by RFE, and RFE has  
28 never existed during his employment by PFG. *Id.*

1 **III. ARGUMENT**

2 **A. APPLICABLE LEGAL STANDARDS**

3 **1. Fed. R. Civ. P. 4**

4 Fed. R. Civ. P. 4(a)(1) provides, in pertinent part, that a summons must “name the court  
5 and the parties,” “be directed to the defendant,” “be signed by the clerk” and “bear the court’s  
6 seal.” Fed. R. Civ. P. 4(a)(1)(A), (B), (F), (G).

7 Fed. R. Civ. P. 4(h)(1)(B) provides that service upon a corporation may be effected by  
8 “delivering a copy of the summons and of the complaint to an officer, a managing or general  
9 agent, or any other agent authorized by appointment or by law to receive service of process and—  
10 if the agent is one authorized by statute and the statute so requires—by also mailing a copy of each  
11 to the defendant.”

12 Fed. R. Civ. P. 4(m) further provides that if a defendant is not served within a specified  
13 timeframe after the complaint is filed, the court “must dismiss the action without prejudice against  
14 that defendant or order that service be made within a specific time.”

15 **2. Fed. R. Civ. P. 12(b)(4) and 12(b)(5)**

16 Under Fed. R. Civ. P. 12(b)(4), a complaint may be dismissed for insufficient process  
17 where the summons fails to comply with the requirements under Fed. R. Civ. P. 4. Similarly,  
18 under Fed. R. Civ. P. 12(b)(5), a complaint may be dismissed for insufficient service of process.

19 “Service of process is a jurisdictional requirement: a court lacks jurisdiction over the  
20 person of a defendant when that defendant has not been served.” *Diamond Sys., LLC v. FMC*  
21 *Corp.*, 2013 WL 6051531, \*2 (M.D. Fla. Nov. 15, 2013) (citing *Pardazi v. Cullman Med. Ctr.*,  
22 896 F.2d 1313, 1317 (11th Cir.1990)). **Plaintiff bears the burden** of establishing the validity of  
23 the challenged service. *Brockmeyer v. May*, 383 F.3d 798, 801 (9th Cir. 2004) (“Once service is  
24 challenged, plaintiffs bear the burden of establishing that service was valid under Rule 4.”). “If  
25 the plaintiff is unable to satisfy his burden, the Court has the discretion to either dismiss the action  
26 or retain the action and quash the service of process.” *Lamon v. Junious*, 2014 WL 7337390, at \*2  
27 (E.D. Cal. Dec. 23, 2014) (citing *Stevens v. Sec. Pac. Nat’l Bank*, 538 F.2d 1387, 1389 (9th Cir.  
28 1976)). Dismissal is appropriate where there is no reasonable prospect that service will be



1 effectuated upon the defendant. *See, e.g., Superior Fibre Prod., Inc. v. United States Dep't of the*  
 2 *Treasury*, 156 F.Supp.3d 54, 66 (D.D.C. 2016) (“Where there is ‘no reasonable prospect of  
 3 effecting service,’ dismissal without prejudice is the appropriate course.”).

4 **B. PLAINTIFF’S SAC SHOULD BE DISMISSED AS AGAINST RFE**

5 **1. The Action Should Be Dismissed As Against RFE For Insufficient**  
 6 **Process Pursuant To Fed. R. Civ. P. 12(b)(4) Because The State Court**  
 7 **Summons Is Defective Due To Its Failure To Comply With Fed. R. Civ.**  
 8 **P. 4**

9 Plaintiff’s SAC should be dismissed as against RFE because the State Court Summons is  
 10 materially and substantially defective in form and substance due to the fact that it fails to “name  
 11 the court and the parties,” is not “directed to the defendant,” is not “signed by the clerk” and fails  
 12 to “bear the court’s seal” as mandated by Fed. R. Civ. P. 4(a)(1)(A), (B), (F) and (G).

13 First, the State Court Summons is defective because it is not directed to “Roma Food  
 14 Enterprises, Inc.” as required under Fed. R. Civ. P. 4(a)(1)(B). Instead, the Summons is directed  
 15 to “PERFORMANCE FOOD GROUP, INC., a Colorado corporation, VISTAR  
 16 TRANSPORTATION, LLC, a Delaware limited liability company, ROMA GOURMET FOOD  
 17 ENTERPRISES OF CALIFORNIA, INC., a California corporation; and DOES 1-50, inclusive.”  
 18 *See Hickman Decl., Exh. A; Kelly Decl., Exh. A.*

19 For that same reason, the State Court Summons is also defective for failing to name the  
 20 parties as required under Fed. R. Civ. P. 4(a)(1)(A) because it fails to name “Roma Food  
 21 Enterprises, Inc.” as a defendant in the action. Likewise, the State Court Summons also fails to  
 22 comply with Fed. R. Civ. P. 4(a)(1)(A)’s requirement that it “name the court” because it  
 23 erroneously names the California Superior Court for the County of Alameda instead of the United  
 24 States District Court for the Northern District of California where this action is and was pending  
 25 when service was attempted on RFE.

26 The State Court Summons is also defective for the additional reason that it fails to comply  
 27 with Fed. R. Civ. P. 4(a)(1)(F)-(G) because it was issued and signed by the Clerk of the California  
 28 Superior Court for the County of Alameda, and bears the seal of the Superior Court of California,  
 County of Alameda. However, because this action is and at the time of the purported service upon



RFE was pending in this United States District Court for the Northern District of California, a federal court Summons should have been issued that is signed by the Clerk and bearing the seal of this United States District Court for the Northern District of California. Consequently, the State Court Summons fails to comply with Fed. R. Civ. P. 4(a)(1)(F)-(G)'s requirement that it be signed by the clerk and bear the court's seal, and Plaintiff's action against Roma should be dismissed on this basis. *Accord Gianna Enterprises v. Miss World (Jersey) Ltd.*, 551 F.Supp. 1348, 1358 (S.D.N.Y. 1982) (ineffective service of summons which was not signed by clerk or under seal of court resulted in dismissal of action against defendant); *United States v. Nat'l Muffler Mfg., Inc.*, 125 F.R.D. 453, 455 (N.D. Ohio 1989) (same).

**2. The Action Should Be Dismissed As Against RFE For Insufficient Service Of Process Pursuant To Fed. R. Civ. P. 12(b)(5) Because Plaintiff Failed To Effect Service Upon RFE**

Plaintiff's SAC should also be dismissed as against RFE pursuant to Fed. R. Civ. P. 12(b)(5) because Plaintiff failed to serve the purported process on RFE in the manner required by Fed. R. Civ. P. 4(h)(1)(B), which mandates that it be served upon "an officer, a managing or general agent, or any other agent authorized by appointment or by law to receive service of process."

Here, Plaintiff failed to serve the purported process on an "officer" or "managing or general agent" of RFE, or someone otherwise authorized to accept service on behalf of RFE. Instead, Plaintiff served the purported process upon PFG's registered agent for service of process, NRAI, in Denver, Colorado. But NRAI is not a parent or subsidiary of RFE, and neither NRAI nor any of its personnel, including Ms. Kelly, has served or been affiliated in any capacity with RFE. *See Hickman Decl.*, ¶ 5; *Kelly Decl.*, ¶ 3. Neither NRAI nor Ms. Kelly has never been designated as RFE's agent for service of process in Colorado or California, nor have either ever held themselves out as a designated or registered agent for RFE. *Id.*; *Kelly Decl.*, ¶ 3. Neither NRAI nor any of its personnel, including Ms. Kelly, has ever been authorized by appointment, law or otherwise to accept service of process on behalf of RFE in Colorado or California. *Hickman Decl.*, ¶ 5; *Kelly Decl.*, ¶ 3. In addition, Ms. Kelly has never served or held herself out as an employee, officer, managing agent or general agent of RFE. *Kelly Decl.*, ¶ 3. Therefore, Plaintiff

1 has failed to effect service upon RFE in accordance with Fed. R. Civ. P. 4(h)(1)(B), thereby  
 2 rendering his action against RFE subject to dismissal on this basis as well.

### 3 **3. Dismissal Is The Proper Remedy**

#### 4 **a. *Dismissal Is Mandated Under Fed. R. Civ. P. 4(m)***

5 The FAC, which is the first pleading naming RFE as a defendant in this action, was filed  
 6 on June 11, 2015. *See* Dkt. #8. Therefore, to be timely under the version of Fed. R. Civ. P. 4(m)  
 7 then in effect,<sup>2</sup> service of the FAC should have been accomplished within 120 days after the filing  
 8 of the FAC, or by October 9, 2015, which was over one year ago. But Plaintiff still has not  
 9 effected valid service upon RFE nor has Plaintiff moved for an extension of time to do so.  
 10 Accordingly, pursuant to Fed. R. Civ. P. 4(m), the Court “must dismiss the action without  
 11 prejudice against” RFE. *See Howard v. Klynveld Peat Marwick Goerdeler*, 977 F.Supp.654, 658  
 12 (S.D.N.Y. 1997), *aff’d*, 173 F.3d 844 (2d Cir. 1999) (“Among federal courts, there is virtual  
 13 unanimity that dismissal is mandatory if a defendant is not served within 120 days, unless the  
 14 plaintiff can show good cause for delay.”) (citations and internal quotation marks omitted).

#### 15 **b. *Dismissal Is Also Appropriate Because There Is No Reasonable*** 16 ***Prospect Of Plaintiff Effecting Service Upon RFE Given That It*** ***Has Not Existed Since 2008***

17 Because there is no reasonable prospect that service will be effectuated upon RFE,  
 18 dismissal of this action against RFE is the appropriate remedy. *Superior Fibre Prod., Inc.*, 156  
 19 F.Supp.3d at 66. Indeed, Plaintiff will not be able to effect service upon RFE because it has not  
 20 existed since 2008. Benton Decl., ¶ 2. As set forth above, RFE was acquired by Vistar  
 21 Corporation on January 28, 2005 pursuant to a Stock Purchase Agreement and subsequently  
 22 merged into Vistar Corporation on February 25, 2008. *Id.* at ¶ 2. As such, RFE has had no  
 23 employees, officers, managing or general agents, or designated agents for service of process, and  
 24 has had no ongoing business operations, for over six years now. *Id.* at ¶ 3. Therefore, RFE has  
 25 ceased to exist, and there is no prospect of Plaintiff ever effecting service upon it in the future. As  
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27 <sup>2</sup> The current version of Fed. R. Civ. P. 4(m) requires service to be accomplished within 90  
 28 days after the complaint filed.

1 such, the SAC should be *dismissed* as against RFE.

2 **C. AT A MINIMUM, PLAINTIFF'S PURPORTED SERVICE OF THE STATE COURT**  
3 **SUMMONS ON RFE SHOULD BE QUASHED**

4 Alternatively, if the Court is not inclined to dismiss the action at this juncture, RFE  
5 requests that the Court quash the purported service of the State Court Summons on it.

6 **IV. CONCLUSION**

7 For all of the foregoing reasons, RFE respectfully requests that the Court dismiss this  
8 action against it or, alternatively, quash the purported service of the State Court Summons on it.

9  
10 DATED: October 10, 2016

**McGUIREWOODS LLP**

11  
12 By: /s/ Matthew C. Kane

13 Matthew C. Kane, Esq.  
14 Sabrina A. Beldner, Esq.  
15 Sylvia J. Kim, Esq.

16 Attorneys for Defendants  
17 PERFORMANCE FOOD GROUP, INC. and  
18 VISTAR TRANSPORTATION, LLC  
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**CERTIFICATE OF SERVICE**

I hereby certify that on October 10, 2016, I electronically transmitted the foregoing document to the Clerk's Office using the CM/ECF System for filing and service via transmittal of a Notice of Electronic Filing.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on October 10, 2016 at Los Angeles, California.

\_\_\_\_\_  
/s/ Matthew C. Kane  
MATTHEW C. KANE